property in the possession, custody or control of the Chase National Bank of the City of New York, as trustee" under the 1928 indenture was property which was and prior to January 1, 1947, had been "owned or controlled by, . . . held on behalf of or on account of" said enemy nationals.[6] The described property was declared "vested in the Attorney General of the United States . . ." (R. 75).

Thereafter, respondent filed its complaint in the Supreme Court, County of New York, alleging, *inter alia*, that one of the defendants, Hans Dietrich Schaefer, a minor and an American citizen, had a vested interest in the trust fund;[7] that another minor defendant had a contingent remainder interest; that other named defendants were minors; and that the vesting of the trust fund in 1953 was illegal. The complaint prayed that the court enter a judgment approving respondent's account as trustee; that the court determine whether the principal of the trust should be transferred to petitioner; and that, if the court should order a transfer, respondent be allowed to retain certain reserves and to receive payment of its costs and disbursements (R. 7-58).

Petitioner's answer set up the vesting of the trust corpus by the Amendment to Vesting Order No. 4551; averred that the sole relief and remedy from the said Amendment was that provided by the Trading with

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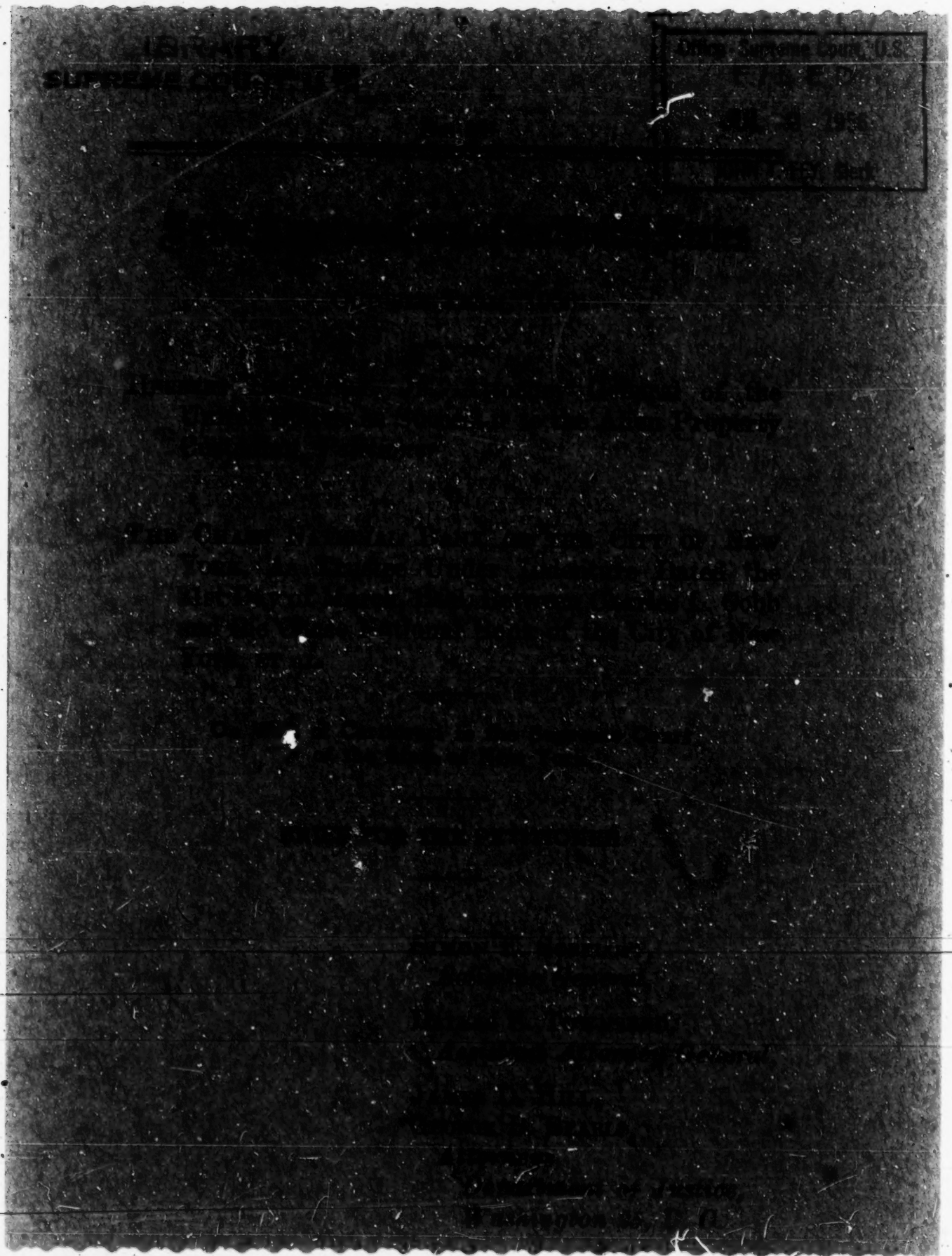
[6] The Amendment was published in the Federal Register (18 F.R. 2[illegible]) and a certified copy was mailed to respondent in a letter dated April 15, 1953 (R. 57-58).

[7] Hans Dietrich Schaefer, a son of Reinicke's daughter Johanne, was born in this country in 1953 (R. 253).



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CASES:

STATUTES, TREATIES, AND EXECUTIVE ORDERS:

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 24

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, *Petitioner*

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, As Trustee Under Indenture Dated the 21st Day of March, 1928, Between Charles L. Cobb and the Chase National Bank of the City of New York, ET AL.

On Writ of Certiorari to the Supreme Court of the State of New York

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of the State of New York, New York County (R. 338-339; New York Law Journal, May 28, 1954, p. 7), is not officially reported. That court's findings of fact and conclusions of law appear at R. 150-168. Neither the Appellate Division, which affirmed, nor the Court of Appeals, which denied a motion for leave to appeal, wrote an opinion.

JURISDICTION

The first judgment of the Supreme Court, New York County, was entered on June 22, 1954 (R. 169-177). On June 14, 1955, the Appellate Division entered an order of affirmance (R. 344-345). On remittitur, the Supreme Court entered a further judgment dated July 5, 1955 (R. 347-348). On October 6, 1955, the Court of Appeals denied leave to appeal (R. 346). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

By Vesting Order No. 4551, dated January 29, 1945, the Alien Property Custodian vested, under the Trading with the Enemy Act, "all right, title, interest and claim" of various individuals in and to the trust established in 1928 by an indenture between one Cobb and respondent Bank. The New York courts held that by such vesting petitioner, as successor to the Custodian, did not become entitled to receive the income of the trust or to exercise the powers over the trust given by the indenture to the settlor. On April 6, 1953, petitioner amended the Vesting Order to *res* vest all property held by respondent Bank under said indenture, on a finding that it was property then and prior to January 1, 1947, owned or controlled or held on behalf of nationals of a designated enemy country (Germany).

The question is whether petitioner, by the amendment to the Vesting Order, became entitled to the immediate possession of the trust property.

STATUTES AND EXECUTIVE ORDERS INVOLVED

The relevant provisions of Sections 5(b), 7(c), and 9 of the Trading with the Enemy Act, as amended, of the Joint Resolution of October 19, 1951, and of Executive Order No. 9193, as amended, are set forth in the Appendix, *infra*, pp. 29-35.

STATEMENT

The Property Involved; the Trust Terms

The property which is the subject of this proceeding is held by respondent Chase National Bank of the City of New York[1] in trust under an indenture dated March 21, 1928, and signed by it and Charles L. Cobb (R. 21-53). The trust was created for the benefit of the children of Bruno Reinicke (R. 21), and Bruno Reinicke, not Cobb, was the real settlor of the trust and has the sole right of reversion of the assets of the trust (R. 237).

The terms of the indenture gave Reinicke extensive powers over the trust property.[2] He could order the trustee to make loans to beneficiaries upon such terms as he might establish (R. 22). He could direct the trustee to make loans to himself (Reinicke) in amounts up to eighty per cent of the trust property (R. 22). He could direct the trustee to pay all or part of the net income from the trust to any or all of the Reinicke children (R. 22-23). In specified circumstances, he

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[1] Unless otherwise indicated, "respondent" in this brief will refer to the Bank and not to individual respondents.

[2] His wife Elizabeth was to succeed to his powers on his death (R. 47). Bruno Reinicke and his wife are still living (R. 107).

could direct the payment of up to fifty per cent of the trust income to himself (R. 23).

Reinicke also retained power to supervise the trustee's investments and to guide other matters of trust policy (R. 38-39). The trustee was to render accounts to Reinicke (R. 43) and, upon Reinicke's request, to give him proxies to vote the securities held in the trust (R. 39). And Reinicke retained power to postpone or to advance the date of distribution of shares to the trust beneficiaries (R. 45-46).

Save to the extent that payment of income might be directed by the settlor, the indenture provided that the trustee was to accumulate income (R. 22). Upon the death of the survivor of Reinicke and his wife, Elizabeth, the trustee was to divide the trust estate and accumulated income into shares—one share for each surviving child of the Reinickes and one share for each deceased child who was represented by a living descendant or descendants (R. 24). The shares of the children were to be distributed to them upon their attaining specified ages.[3]

The indenture also provided, in substance, that in the event of a failure of direct descendants the trust property should be divided among the nephews and

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[3] In the case of the two Reinicke children who were in existence at the time the trust indenture was drawn (Bruno Carl, born in 1921, and Robert Hans, born in 1923, R. 47), it was provided that they should receive one fourth at age twenty-one and additional fourths at ages twenty-six, thirty-one, and thirty-six (R. 24-29). Children born after the date of execution of the indenture (1928) were to receive their shares at age twenty-one (R. 33-34). There is one child in this category, Johanne Maria Reinicke Schaefer, a daughter born in 1929 (R. 107, 253).

nieces of Reinicke then living, with the issue of any deceased nephew or niece taking the parent's share *per stirpes* (R. 35-36).[4]

The 1945 Vesting and the Ensuing Judicial Proceedings

On January 29, 1945, the Alien Property Custodian executed Vesting Order No. 4551, vesting in himself, as property of nationals of a designated enemy country (Germany), "[a]ll right, title, interest and claim" of Reinicke, his wife, his three living children, and any other child or children of Bruno and Elizabeth Reinicke, and of a number of other persons listed in the Order, in and to the trust (R. 67-72).

After issuing this Vesting Order, the Custodian intervened in an action which respondent Bank had brought in the Supreme Court, New York County, for construction of the trust indenture and for settlement of its accounts (R. 12, 212-213). In November, 1946, the Attorney General was substituted for the Custodian as intervening defendant, and he filed a substitute answer asking (1) that respondent be directed to deliver to him, upon termination of the trust, the shares in the trust of the persons whose interests had been vested; and (2) that the court decree that he had succeeded to certain powers over the trust (R. 12).[5]

The New York court denied the relief requested by the Attorney General. By a judgment dated

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[4] If there were no direct descendants, or nephews or nieces, or descendants of nephews or nieces, the property was, to go to Reinicke's heirs as determined under Illinois law.

[5] By Executive Order No. 9788 (11 F.R. 11981), the functions and powers of the Alien Property Custodian were transferred to the Attorney General.

January 30, 1948, it settled the trustee's accounts (R. 215) and held that respondent was authorized to administer the trust in its discretion while Reinicke's powers remained "subject to blocking or other Governmental control either of this country or of any government in Germany" (R. 221). The court also held that the Attorney General was not entitled to receive the income of the trust during the life of Reinicke; that he had not succeeded to Reinicke's "powers over the management of the trust fund" or to Reinicke's power "to direct the payment of income," these being "personal" powers; and that he had no power to change the terms of the trust indenture (R. 223).

On appeal, the Appellate Division, one judge dissenting, affirmed (R. 225-226, 229-230), on the ground that "[t]he vesting order indicates no intention to appropriate fiduciary powers." *Chase National Bank of the City of New York* v. *McGrath*, 276 App. Div. 831, 93 N.Y.S. 2d 724. The Court of Appeals affirmed. *Chase National Bank of City of New York* v. *McGrath*, 301 N.Y. 602, 93 N.E. 2d 495.

The 1953 Vesting and the Further Judicial Proceedings

On April 6, 1953, petitioner issued an "Amendment to Vesting Order 4551" (R. 72-75). The Amendment recited that after investigation it had been found that Bruno Reinicke, his wife, his children, and the other persons named, and the descendants, heirs, and issue, names unknown, of certain of the persons named, were, and had been prior to January 1, 1947, nationals of a designated enemy country (Germany), and that "[a]ll

the Enemy Act; and that the court was without jurisdiction to order the setting up of reserves. The answer prayed a judgment that petitioner was entitled to immediate possession of the corpus of the trust and of all accumulations, and ordering respondent to account for and pay over the property to petitioner (R. 59-75).

Answers were also filed by a guardian *ad litem* for Hans Dietrich Schaefer, by the three children of Reinicke, and by a guardian *ad litem* for a number of defendants who were alleged to be minors (R. 76-85, 86-96, 96-97). All opposed the relief sought by petitioner and claimed that the 1953 Amendment to the Vesting Order was illegal, contrary to the judgment in the earlier litigation, and unconstitutional.

In an opinion filed at Special Term on May 28, 1954, the New York Supreme Court held that petitioner was not entitled to the relief he requested. It declared (R. 338):

> Whatever may be the difference between the original and the amended vesting orders the indisputable fact remains that there is at least one person now in being who is a United States citizen and who may well become entitled to the entire principal of this trust upon its termination.

In its "Decision" filed June 15, 1954, the Court found as a fact that the person in question, Hans Dietrich Schaefer, has a contingent interest in the trust fund (R. 159). It also found, *inter alia*, that petitioner had submitted to the jurisdiction of the court in the earlier suit and "a judgment has been made determining that the powers claimed by the Attorney General of the United States as successor to the Alien Property

Custodian, over this trust are not vested in him and may not be exercised by the Attorney General" (R. 159); that the trust property "is not properly payable or deliverable to or claimed by or held for or owned by any person" (R. 160); that the ultimate remaindermen are not "ascertainable . . . at this time" (R. 160); that petitioner is not entitled to the possession of the corpus and respondent is entitled to continue to hold and administer it under the indenture (R. 161).

On June 22, 1954, the court entered judgment directing respondent to retain the principal and accumulated income (R. 169-177). It also ordered the payment of fees to the guardians *ad litem* and payment of the costs and disbursements of the trustee (R. 176-177).

Petitioner thereupon appealed to the Appellate Division, challenging the denial of "the relief requested in the answer" (R. 3). On June 14, 1955, that court affirmed without opinion (R. 344). *Chase National Bank of City of New York* v. *Reinicke*, 286 App. Div. 808, 143 N.Y.S. 2d 623. A motion by petitioner for leave to appeal to the Court of Appeals of New York was denied by that court on October 6, 1955 (R. 346). *Chase National Bank of the City of New York* v. *Reinicke*, 129 N.E. 2d 790.

SUMMARY OF ARGUMENT

1. The 1953 Amendment to the 1945 Vesting Order constituted a *res* vesting and entitled petitioner to summary relief directing delivery of the described property. *Zittman* v. *McGrath*, 341 U.S. 471; *Brownell*

v. *Singer*, 347 U.S. 403. The language of the Trading with the Enemy Act and of the Executive Order issued pursuant thereto authorized the vesting of the corpus of the trust and not merely of the enemy interests. *Stoehr* v. *Wallace*, 255 U.S. 239, 245; *Kahn* v. *Garvan*, 263 Fed. 909, 914 (S.D.N.Y.). For purposes of the present right to possession, the findings in the 1953 Order are conclusive. *Commercial Trust Co.* v. *Miller*, 262 U.S. 51, 53. Thus, when that Order was issued it became the duty of respondent to deliver the property. And petitioner was entitled to enforcement of that obligation in the New York courts. *Brownell* v. *Singer*, *supra*.

2. It was within the constitutional authority of Congress under the war power to authorize the 1953 vesting even after the termination of the technical "state of war" with Germany. *Commercial Trust Co.* v. *Miller*, 262 U.S. 51, 57; *LaDue & Co.* v. *Brownell*, 220 F. 2d 468 (C.A. 7), certiorari denied, 350 U.S. 823. The war power may be exercised after the war to deal with the problems arising out of the war (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146) and to authorize the postwar seizure of property that was enemy during the war. *Codray* v. *Brownell*, 207 F. 2d 610 (C.A.D.C.), certiorari denied, 347 U.S. 903; *Klein* v. *Palmer*, 18 F. 2d 932 (C.A. 2).

3. The earlier 1948 judgment of the New York court, interpreting the 1945 vesting order, did not bar the enforcement in 1953 of a subsequent *res* vesting, for all that was in question in the earlier suit was the rights of the Attorney General under a "right, title, and interest" vesting whereby he stepped into the

shoes of the persons named in the order. *Zittman* v. *McGrath,* 341 U.S. 446, 463-464. The "causes of action" in 1948 and in 1953 were different. In 1948, the Attorney General claimed in the right of the persons named in the 1945 Order, while by the 1953 Order he made a direct seizure of the *res.* The right to seize the *res* was not, nor could it have been, adjudicated in the prior proceeding. *Cromwell* v. *County of Sac,* 94 U.S. 351, 352-353; *Brownell* v. *Singer,* 347 U.S. 403.

That there may be an outstanding, contingent, non-enemy interest in the trust property is irrelevant from the standpoint of petitioner's present right to possession. The exclusive remedy of those who claim non-enemy interests in vested property is a suit for recovery pursuant to Section 9(a) of the Act. *Becker Co.* v. *Cummings,* 296 U.S. 74. There is no question of the adequacy of that remedy since Section 9(a) is broad enough to cover all property interests within the protection of the Fifth Amendment. *Ibid.*

ARGUMENT

I. The Attorney General Is Authorized to Take Over and Administer the Fund in Suit in Accordance With the Trading With the Enemy Act. *Zittman* v. *McGrath,* 341 U.S. 471, and *Brownell* v. *Singer,* 347 U.S. 403, are Directly in Point and Controlling

The property in suit, which was vested by the 1953 Amendment to Vesting Order No. 4551,[8] consists of:

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[8] The 1953 Order (R. 53-56) was designated as an "amendment" to the 1945 Vesting Order No. 4551 (R. 67-72), since it related to the same trust. It is clear from the language of the amendment, however, that it was, in and by itself, a distinct and independent act of seizure under the statute.

> All property in the possession, custody or control of the Chase National Bank of the City of New York, as trustee under a certain indenture of trust dated March 21, 1928, between Charles L. Cobb and the Chase National Bank of the City of New York, as subsequently amended, subject to expenses of administration. [R. 54-55]

This was an identifiable and identified fund, a *res*. The decisions of this Court under the original Trading with the Enemy Act of 1917 have long settled that such an act or declaration of seizure entitles the Alien Property Custodian to immediate possession of the *res* and to summary judicial relief when delivery of possession is refused. *Central Trust Co.* v. *Garvan*, 254 U.S. 554, 567; *Stoehr* v. *Wallace*, 255 U.S. 239, 245; *Commercial Trust Co.* v. *Miller*, 262 U.S. 51, 53; *Gt. Northern Ry.* v. *Sutherland*, 273 U.S. 182; *Becker Co.* v. *Cummings*, 296 U.S. 74, 79. This is equally true of *res* vestings made under the Act as amended in World War II. *Silesian-American Corporation* v. *Clark*, 332 U.S. 469; *Cities Service Co.* v. *McGrath*, 342 U.S. 330; *Orvis* v. *Brownell*, 345 U.S. 183, 186.

Most recently, the rule has been applied, in circumstances closely paralleling the case at bar, in *Brownell* v. *Singer*, 347 U.S. 403. In *Singer*, the Superintendent of Banks of the State of New York, in possession of the assets of the New York Agency of the Yokohama Specie Bank, set up on his books a reserve for the payment of the claim of Singer, if and when it became payable. Singer's claim had been previously established under New York law in litigation in which the United States appeared as *amicus curiae*. The

New York courts had recognized, however, that the claim could not actually be paid without a license from the Secretary of the Treasury. *Singer* v. *Yokohama Specie Bank,* 299 N.Y. 113, 85 N.E. 894, affirmed, *sub. nom. Lyon* v. *Singer,* 339 U.S. 841. Subsequent to that litigation and the establishment of the reserve, the Attorney General, exercising his powers under the Trading with the Enemy Act, issued a "turn-over directive" requiring the Superintendent to pay over to him the fund set up as a reserve. On a petition by the Superintendent for instructions, the Supreme Court of New York refused to authorize a transfer of the fund to the Attorney General on the grounds that to do so would nullify Singer's judgment and that in the earlier litigation the fund involved had been adjudicated to be non-enemy. *Matter of Yokohama Specie Bank, Ltd.,* 200 Misc. 610, 103 N.Y.S. 2d 228. On appeal, the New York appellate courts affirmed. 280 App. Div. 970, 116 N.Y.S. 2d 926; 305 N.Y. 908, 114 N.E. 2d 469. This Court reversed, *per curiam,* citing *Zittman* v. *McGrath,* 341 U.S. 471.

The essential situation in the cited *Zittman* case (*Zittman No. 2*) was as follows. American creditors of German nationals had attached the latter's blocked assets deposited in New York banks and had proceeded to judgment against them in the New York courts.[9] This Court held that the Custodian, upon his subsequent issuance of a turnover directive, had "power to possess himself of [the] funds and to administer

[9] As in the *Singer* litigation, the New York courts had recognized that satisfaction of the judgments would require a federal license.

them"; that "[t]o hold otherwise would be incompatible with the federal program"; and that all asserted rights and priorities of the judgment creditors would have to be determined in proceedings instituted pursuant to the provisions of the Trading with the Enemy Act. 341 U.S. at 473-474.[10]

In the instant case, the 1953 "res" vesting had the same effect as the turnover directives issued in *Singer* and in *Zittman No. 2.* See, also, *Matter of Yokohama Specie Bank,* 188 Misc. 137, 141, 66 N.Y.S. 2d 289, 293; *In re Young's Estate,* 204 Misc. 92, 118 N.Y.S. 2d 803. Here, as there, we have a finding that specific described property is enemy owned or controlled and an express determination (see R. 55) that it should be administered by the United States. Here, no less than there, "[t]he power of the United States to take and administer the fund is paramount." *Zittman No. 2,* 341 U.S. at 474.

Respondents have contended that, in the case of property held in trust, the United States may vest only the enemy "interest." This is a variation of the argument that enemy ownership must be adjudicated before the Custodian is entitled to possession, a contention rejected by this Court as long ago as *Stoehr* v. *Wallace,* 255 U.S. 239, 245. The contention not only lacks foundation in the statute; it is contrary to its plain language. Section 7(c) of the original Act (*infra,* p. 30) comprehensively authorizes the seizure

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[10] In the companion *Zittman* v. *McGrath* case, 341 U.S. 446 (*Zittman No. 1*), which involved a "right, title and interest" vesting, as distinguished from a seizure of the *res,* the Court held, contrariwise; that the Custodian had not asserted his possessory powers.

of "any . . . property" determined to be held "for . . . or on behalf of, or for the benefit of an enemy"—language certainly encompassing property held in trust, *Kahn* v. *Garvan,* 263 Fed. 909, 914 (S.D.N.Y.). The wording of amended Section 5(b) (*infra,* p. 29) is equally broad, authorizing the vesting of "any property," without qualification as to the terms on which it is held. Executive Order 9193 (*infra,* p. 34), promulgated by the President in 1942 in implementation of Section 5(b), specifically authorizes the Custodian to vest, *inter alia,* "[a]ny property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision."

Held in trust or otherwise, the simple fact is that the bonds and stock certificates in respondent's hands (see R. 260-275) are property and are within the Act. Nothing in the statute or the decided cases suggests that the contract of a trust indenture will render property immune from seizure. Cf. *Norman* v. *B. & O. R. Co.,* 294 U.S. 240, 308. As this Court has emphasized, the forms of ownership are immaterial, since it is the basic purpose of the Act to enable the Custodian to reach and take control of any property tainted by an enemy interest *Clark* v. *Uebersee Finanz-Korp.,* 332 U.S. 480, 484-486.

In point of fact, countless seizures under the Act sustained by this and other courts have involved property held by fiduciaries, including trustees. See, *e.g., Central Trust Co.* v. *Garvan,* 254 U.S. 554; *Commercial Trust Co.* v. *Miller,* 262 U.S. 51; *Farmers' Loan & Trust Co.* v. *Hicks,* 9 F. 2d 848 (C.A. 2),

certiorari denied, 269 U.S. 583; *Central Hanover Bank & Trust Co.* v. *Markham,* 68 F. Supp. 829, 831 (S.D.N.Y.); *Keppelmann* v. *Palmer,* 91 N.J. Eq. 67, 108 Atl. 432, certiorari denied, 252 U.S. 581; *Application of Alien Property Custodian of U.S.,* 270 App. Div. 732, 60 N.Y.S. 2d 897; *Matter of Daly,* 189 Misc. 680, 74 N.Y.S. 2d 711.

Since the property identified in the *res* vesting order was plainly subject to the vesting power, and since the correctness of the Custodian's finding that the property is "enemy" in character is challengeable only in a suit for recovery brought under Section 9(a) (*infra,* p. 31),[11] respondent was under a duty to deliver possession. *Central Trust Co.* v. *Garvan,* 254 U.S. 554, 567; *Miller* v. *Lautenburg,* 239 N.Y. 132, 145 N.E. 907. And this obligation was one which petitioner was entitled to enforce in the state courts, their ordinary procedures being competent to give the relief sought. *Brownell* v. *Singer,* 347 U.S. 403; *United States* v. *Bank of New York,* 296 U.S. 463, 479; *Wasservogel* v. *Meyerowitz,* 300 N.Y. 125, 89 N.E. 2d 712; *Fleming* v. *Russell,* 296 N.Y. 985, 73 N.E. 2d 565. Cf. *Testa* v. *Katt,* 330 U.S. 386.

II. The 1953 Order of the Attorney General Was Authorized by the Joint Resolution of October 19, 1951, and That Resolution Was Constitutional

The authority of the Attorney General to make a new seizure in 1953 of a distinct property interest, the

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[11] For purposes of obtaining possession of vested property, the Custodian's findings, this Court has stated, are conclusive, "whether right or wrong." *Commercial Trust Co.* v. *Miller,* 262 U.S. 51, 53.

res, was within the Joint Resolution of October 19, 1951 (65 Stat. 451, *infra,* p. 33).[12] That Resolution terminated the state of war with Germany for most purposes, but provided that property which, prior to January 1, 1947, was "subject to vesting or seizure" under the Act, should continue to be subject to the provisions of the Act as if the Resolution had not been adopted.[13] That is, it reserved and continued in effect after its date the authority to vest German property which had been subject to vesting up to January 1, 1947. *LaDue & Co.* v. *Brownell,* 220 F. 2d 468 (C.A. 7), certiorari denied, 350 U.S. 823.

The authority to vest pre-1947 German property was continued in effect in order to enable the United States to carry out the commitments it had made to war claimants in the War Claims Act of 1948 (62 Stat. 1240) and its engagements with its allies in regard to reparations and German "external" assets. See Senate Report No. 892, 82d Cong., 1st Sess., p. 6; 97 Cong. Rec. 7762.[14] By the same token, it furthered

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[12] The New York courts did not question the continued existence of the federal vesting power, although the individual respondents challenged the constitutionality of the Amendment to the Vesting Order (R. 82, 84, 93, 95). The same respondents urge the point in their brief in opposition to certiorari (pp. 9-10) as a ground for affirmance.

[13] In his 1953 Amendment to the Vesting Order, the Attorney General found that the trust property here involved "is property which is and prior to January 1, 1947, was within the United States owned or controlled by . . . held on behalf of" nationals of Germany (R. 55).

[14] The engagements with our allies were contained in the "Agreement on Reparation from Germany," effective January 14, 1946 (61 Stat. 3157), and the Brussels Agreement, (18 Dept. of State Bull. 6), confirmed by Section 40 of the Act. (64 Stat. 1079).

an important purpose of the Trading with the Enemy Act: the use of enemy property to pay claims of the United States and its citizens for expenses and losses occasioned by the war. See *Cummings* v. *Deutsche Bank,* 300 U.S. 115; *Propper* v. *Clark,* 337 U.S. 472, 484. Cf. *Ware* v. *Hylton,* 3 Dall. 199, 227.

Such a continuation of the vesting authority was within the war powers of Congress under the Constitution. The war powers are not cut off short at the moment of the making of peace. *Woods* v. *Miller Co.,* 333 U.S. 138; *Ludecke* v. *Watkins,* 335 U.S. 160. And those powers may be exercised after the formal termination of war to deal with the problems directly arising out of the war. *Hamilton* v. *Kentucky Distilleries Co.,* 251 U.S. 146. As of October, 1951, the war claims of Americans were still unpaid, and it was altogether reasonable to devote to that purpose a portion of the enemy assets still within reach of the United States, though not yet vested. During the state of war, the power of Congress over enemy property in the United States was complete. *United States* v. *Chemical Foundation,* 272 U.S. 1, 11; *Cummings* v. *Deutsche Bank,* 300 U.S. 115, 120. Without a hearing and without compensation, Congress, on October 18, 1951, could have enacted a statute transferring to the United States, or to any agency of the United States, title to all German property within our reach, without calling upon any executive agency to act by way of seizure. Cf. *Bowles* v. *Willingham,* 321 U.S. 503, 517, 519. Collection of the property and reduction to possession could have been left to a subsequent date, as was done in World War I when demands served

before July 2, 1921, were enforced after that date. See *Application of Miller*, 288 Fed. 760, 766 (C.A. 2); *In re Miller*, 281 Fed. 764, 773 (C.A. 2), appeal dismissed, *sub nom. Schaefer* v. *Miller*, 262 U.S. 760. Instead, by the Joint Resolution, Congress set aside a portion of the German property for future vesting by the Executive.

A similar course was followed for a brief period after World War I. The Joint Resolution approved March 3, 1921 (41 Stat. 1359), terminated the effectiveness of other war legislation, but continued in effect the Trading with the Enemy Act and several other statutes.[15] This Court approved, *Commercial Trust Co.* v. *Miller*, 262 U.S. 51, 57, stating that

> . . . the power which declared the necessity [of war] is the power to declare its cessation, and what the cessation requires. The power is legislative. A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and that their consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field.

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[15] Shortly thereafter, on July 2, 1921, Congress terminated the "state of war" with Germany, without attempting to continue the power to make further seizures. Joint Resolution of July 2, 1921, 42 Stat. 105. That Joint Resolution reserved, however, the authority to reduce to possession property which had already been seized by the service of an instrument termed a "demand." See discussion in text, *supra*, pp. 18-19. And see, also, *Sutherland* v. *Guaranty Trust Co.*, 11 F.2d 696, 698 (C.A. 2); *Miller* v. *Rouse*, 276 Fed. 715 (S.D.N.Y.).

See, also, *National Savings & Trust Co.* v. *Brownell*, 222 F. 2d 395 (C.A.D.C.), certiorari denied, 349 U.S. 955.

A similar application of the war power is found in the cases dealing with treaties of peace. A provision for the continuation after the war of the authority to seize enemy property is a familiar one in such treaties; it is a part of the process of terminating the war. Such provisions were included in the 1951 Treaty with Japan (reprinted in U.S. Code Congressional & Administrative Service, Vol. 2, pp. 2730-2748), and in the 1947 Treaties with Italy (61 Stat. 1245), Bulgaria (61 Stat. 1915), Hungary (61 Stat. 2109), and Rumania (61 Stat. 1757). The validity of the provision in the Treaty with Hungary was upheld in *Codray* v. *Brownell*, 207 F. 2d 610 (C.A.D.C.), certiorari denied, 347 U.S. 903, and the clause was implemented by Public Law 285, 84th Cong., approved August 9, 1955 (69 Stat. 562). A similar provision in the 1921 Treaty of Peace with Germany (42 Stat. 1939) was upheld as an exercise of the war power. *Klein* v. *Palmer*, 18 F. 2d 932 (C.A. 2).

III. Nothing in the Judgments of the New York Courts Bars Petitioner's Right to Possession of the Property

A. The 1948 Judgment Did Not Adjudicate That Right

The New York Supreme Court appears to have rested its decision in part upon the theory that the issues presented here had been adjudicated in the earlier litigation, for it "found" in its Decision that the Attorney General had submitted to the jurisdiction of the court in the earlier action and that judgment

had been entered determining that the powers claimed by the Attorney General were not vested in him and might not be exercised by him (R. 159).[16]

But certainly the authority of the Custodian or of the Attorney General to *res* vest the trust corpus was not adjudicated by the 1948 judgment. As of that date all that had been vested was the "right, title, interest and claim" of Bruno Reinicke and of the other persons named and described in the 1945 Vesting Order (R. 67-72). True, the court found that in the earlier suit the Attorney General requested that the "entire principal of the said trust should be transferred to the Attorney General as Successor to the Alien Property Custodian on the ground that all interests in the trust had vested in the Attorney General by said vesting order #4551" (R. 155-156); but, as the quoted language shows, that request in the earlier suit was based on the vesting of designated "interests", and not on any claim that the Attorney General had vested the corpus.

The most that could have been decided in the prior suit was that under the 1945 "right, title, and interest" Vesting Order the Attorney General, having taken over the interests of Bruno Reinicke and the other persons named, was not thereby entitled to immediate possession of any of the property because the beneficiaries whose interests he had vested were not so entitled; and that the Attorney General had not

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[16] The language of this finding was taken from the complaint (R. 16.) In the answers filed on behalf of respondents Schaefer and Bruno Carl Reinicke, et al., the 1948 judgment was pleaded as *res judicata* (R. 83, 93-94).

thereby acquired the "personal powers" over the trust property which the indenture reserved to Reinicke. See R. 156-158, and the opinion of the Appellate Division, 276 App. Div. 831, 93 N.Y.S. 2d 724.[17] By a "right, title, and interest" vesting the Custodian merely steps into the shoes of the nationals whose interests he vests and he gets no more than they had. *Zittman* v. *McGrath* (*Zittman No. 1*), 341 U.S. 446, 463-464; *Kahn* v. *Garvan*, 263 Fed. 909, 912-913 (S.D.N.Y.); *Miller* v. *Rouse*, 276 Fed. 715 (S.D.N.Y.); *Stern* v. *Newton*, 180 Misc. 241, 39 N.Y.S. 2d 593, 598. The vesting of the right, title, and interest of named beneficiaries does not depend upon or necessarily include a vesting of the *res* itself. Hence, a judgment as to the effect of a "right, title, and interest" vesting does not bar a subsequent taking of the *res*. The claims or "causes of action" are different. *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353; *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620, 623; *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 597.[18]

Respondent suggests in its brief in opposition

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[17] We note parenthetically that this is plainly not a situation in which the holding of *res judicata* could be said to represent merely a state-law determination. The right of the Custodian under a *res* vesting could not have been determined in the prior suit involving the "interest" vesting if there are material differences in the two types of vestings. Whether there are such differences is purely a federal question and, as indicated in the text, this Court has answered that question in the affirmative.

[18] See, also, *Third National Bank of Louisville* v. *Stone*, 174 U.S. 432, 434; *Utter* v. *Franklin*, 172 U.S. 416, 424; *Matter of Mullane* v. *McKenzie*, 269 N.Y. 369, 377, 199 N.E. 624, 625; *Rose* v. *Hawley*, 133 N.Y. 315, 31 N.E. 236, 237; 2 *Freeman on Judgments* (5th ed., 1925), § 712.

(p. 5) that the finding of the court, in the earlier suit, that the persons entitled to principal and interest could not be determined until the trust terminated in some way barred the 1953 *res* vesting of the property as being "owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to" enemy nationals (R. 55). But it does not follow from the fact that the remaindermen who would ultimately be entitled to distribution of the trust estate cannot now be surely identified that there are no enemy interests in the property within the meaning of the Trading with the Enemy Act. And, most assuredly, it does not follow that there was no enemy control.

On the findings in the 1953 Order (R. 54), Bruno Carl Reinicke, Robert Hans Reinicke, and the others were, between December 11, 1941, and January 1, 1947, nationals of a designated enemy country (Germany); to the extent that they had interests under the trust, vested or contingent, by way of life estate or by way of remainder, the property would be held "for . . . or on behalf of or for the benefit of" such nationals. See *Kahn* v. *Garvan*, 263 Fed. 909, 914 (S.D.N.Y.). The anomaly is that respondent would suggest, on the one hand, that the more immediate interests in the trust property—those of the settlor, his wife and his children (all German nationals)—are too indeterminate to provide a basis for seizure of the property as "enemy"; yet, on the other hand, it urges (and the New York Supreme Court held) that the contingent interest of one American-born Reinicke grandchild, an interest considerably more remote, is sufficiently viable to pose an obstacle to seizure. Both notions

rest on the same basic misconception—failure to recognize that property in which there are enemy interests may be seized irrespective of whether those interests encompass the entire bundle of ownership rights and irrespective of whether there are non-enemy interests intermixed.[19] As previously emphasized, the Custodian's power is sufficient to reach all property in which there is enemy taint. *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480. In this case, of course, there is no question that the enemy interests overwhelmingly predominate.

Moreover, ownership interests apart, it seems perfectly clear that the trust property was subject to federal seizure since the trust indenture placed substantial powers of management, control and disposition in the hands of the enemy settlor.[20] *Clark* v. *Uebersee Finanz-Korp., supra.* And see *Uebersee Finanz-Korp.* v. *McGrath,* 343 U.S. 205, 211. It is no answer that the provisions for the trustee's administration made by the New York courts contemplate that, for the present, respondent will act in the exercise of its own discretion, free from the settlor's direction. In the face of a specific assertion of the federal power to seize designated enemy-controlled property, the state courts may not interpose a substitute custodianship.

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[19] If the suggestion is that the indenture has created such a complex and diffuse set of interests that the property cannot be said to be "owned" by anyone or "held for" anyone, and that therefore it is immune from seizure under the Act, it carries its own refutation. Cf. *Smith* v. *Shaughnessy,* 318 U.S. 176, 180.

[20] Enemy control was specifically found by the Custodian, (p. 7, *supra;* R. 55).

In sum, all that the 1948 judgment of the New York court decided was that under a "right, title, and interest" vesting order the Attorney General was not immediately entitled to receive the income or the principal of the trust or to exercise the powers over the trust reserved to the settlor; it decided nothing, and could have decided nothing, as to the authority of the Attorney General to *res* vest the corpus by a *future* order.

B. The Contingent Remainder of Respondent Schaefer Does Not Bar The Relief Sought by the Attorney General

In its Opinion (R. 338-339), the New York Supreme Court appeared to rest its decision on another ground: that "there is at least one person now in being who is a United States citizen and who may well become entitled to the entire principal of this trust upon its termination." The reference is to respondent Hans Dietrich Schaefer, who, so far as the record shows, is the only living Reinicke grandchild. Schaefer has a contingent remainder (R. 159) and apparently will become entitled to receive the entire principal of the trust if the three Reinicke children (Schaefer's mother and his two uncles) fail to survive their parents and die without leaving other issue.

This ground for the decision is wholly insubstantial. It is settled by decisions of this Court that the existence of a claim of title to the property seized under the Act does not constitute a bar to the enforcement of the Custodian's right to possession. *Stoehr* v. *Wallace*, 255 U.S. 239, 245-246; *Commercial Trust Co.* v. *Miller*, 262 U.S. 51, 56; *Ahrenfeldt* v. *Miller*, 262 U.S. 60. And see *Zittman* v. *McGrath* (*Zittman*

No. 2), 341 U.S. 471, 474. By reason of the "sole relief and remedy" provisions of the Act (see Sections 7(c) and 5(b)(2)), jurisdiction to adjudicate claims of ownership or title to property seized or vested under the Act is confined to the appropriate district court of the United States in a suit brought under Section 9(a). The "all inclusive language" denies to claimants "any other remedy." *Becker Co.* v. *Cummings*, 296 U.S. 74, 79. See, also, *Stoehr* v. *Wallace*, 255 U.S. 239; *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 487; *Propper* v. *Clark*, 337 U.S. 472, 484; *Tiedemann* v. *Brownell*, 222 F. 2d 802 (C.A.D.C.); *Kahn* v. *Garvan*, 263 Fed. 909, 914-916 (S.D.N.Y.). The plan of the Act is that the reduction of property to possession is "not to be defeated or delayed by defenses," whether resting on vested or contingent claims. *Commercial Trust Co.* v. *Miller*, 262 U.S. 51, 56.[21]

It does not follow, as respondents have suggested, that delivery of the trust property will leave Schaefer remediless. Section 9(a) is to be liberally construed to protect non-enemy persons. *Miller* v. *Robertson*, 266 U.S. 243, 248. The remedy afforded by the Section is as broad as the class of property interests protected

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[21] By requesting the New York court to order the delivery of the property the Attorney General did not, and could not, consent to the adjudication of questions of title by that court. *United States* v. *Shaw*, 309 U.S. 495; *Ill. Cent. R.R. Co.* v. *Public Utilities Comm.*, 245 U.S. 493, 504. Congress has reserved the determination of such questions to suits under Section 9(a), and "[w]here jurisdiction has not been conferred by Congress, no officer of the United States has power to give any court jurisdiction of a suit against the United States." *Minnesota* v. *United States*, 305 U.S. 382, 388-389.

by the Fifth Amendment, and it is because of that remedy that the seizure provisions of the Act are constitutional. *Becker Co.* v. *Cummings,* 296 U.S. 74, 79-80. See, also, *Stoehr* v. *Wallace,* 255 U.S. 239; *Clark* v. *Uebersee Finanz-Korp.,* 332 U.S. 480, 487.

On the record, Schaefer's interest is contingent, not vested, and he has no present possessory interest to assert. However, in the analogous situation of condemnation of property for a public use, the courts have held that future interests may be entitled to compensation. See *Duke Power Co.* v. *Rutland,* 60 F. 2d 194, 196 (C.A. 4); *Stubbs* v. *United States,* 21 F. Supp. 1007, 1010 (M.D.N.C.); Restatement, *Property* (1936), § 53, comments b, c. Compare *McGinley* v. *Central Nebraska Public Power & Irr. Dist.,* 124 F. 2d 692 (C.A. 8); *Koehler* v. *Clark,* 170 F. 2d 779 (C.A. 9); *Fifer* v. *Allen,* 228 Ill. 507, 81 N.E. 1105, holding interests to be too remote or to be mere expectancies.

It is, of course, unnecessary to determine at this stage what type of relief a court of equity might order, in a proper case, on behalf of a claimant asserting a future interest in property that has been vested, *e.g.*, whether it should grant a judgment in the amount of the appraised value of the interest or adjudge declaratory or some other form of relief. It is enough for present purposes that Section 9(a) is broad enough and the powers of an equity court sufficient to

provide for full satisfaction of all claims entitled to constitutional protection.[22]

CONCLUSION

Zittman v. *McGrath*, 341 U.S. 471, and *Brownell* v. *Singer*, 347 U.S. 403, are controlling and require reversal of the judgment below. Nothing in the prior litigation warrants a departure in this case from the rule established by those cases and the earlier decisions of this Court. The 1948 judgment did not, and could not, adjudicate the authority of the Custodian to obtain possession of the trust property by a *res* vesting, and the rights of remaindermen under the trust may be asserted in a subsequent suit under Section 9(a) of the Act and only under that Section.

For the foregoing reasons, the judgment of the Supreme Court of the State of New York should be reversed.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

DALLAS S. TOWNSEND,
Assistant Attorney General.

JAMES D. HILL,
GEORGE B. SEARLS,
Attorneys.

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[22] We note parenthetically that a notice of claim (which is a prerequisite of suit under Section 9(a)) has been filed on Schaefer's behalf with the Office of Alien Property (Claim No. 66635). Claims have also been filed by the trustee (No. 66634), by Bruno Carl Reinicke (No. 32404) and by Robert Hans Reinicke, (No. 33813).

APPENDIX

1. Trading with the Enemy Act, as amended, 40 Stat. 411, 50 U.S.C. App. § 1, et seq.:

SEC. 5. . . .

(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such

terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, . . .

* * * *

SEC. 7. . . .

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net

proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * *

SEC. 9. . . .

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice

by the Trading With the Enemy Act of October 6, 1917, as amended, and as President of the United States, it is hereby ordered as follows:

* * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * *

(c) Any other property or interest within the United States of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country or national thereof: *Provided, however,* That with respect to any such country or national other than Germany or Japan or any national thereof, such property or interest shall not include cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange, and securities except to the extent that the Alien Property Custodian determines that such cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange, and securities are necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof;

* * *

(f) Any property of any nature whatsoever which is in the process of administration by any

which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof.

* * *